92-1689

No.

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

Scott J. Rafferty

Petitioner

v.

Albert Halprin, et al.

Respondents

Petition for a Writ of Certiorari to the
United States Court Of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Whether a decision by the district court staying judicial proceedings indefinitely "in contemplation of dismissal" without further action is appealable under 28 U.S.C. § 1291 as a "final decision" of the district court or as a "collateral order."

2. Whether the court of appeals can tax costs based on undocumented "billing rates," rather than actual costs, and allow the prevailing party to charge for typesetting a brief that was actually photostatically copied.

3. Whether the local rules of the Court of Appeals for the Second Circuit, comply with Rule 39, Federal Rules of Appellate Procedure, which requires the local rules to set maximum rates for the costs of producing briefs and to encourage the use of the most economic means of printing or reproduction.

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[1] The parties to the proceedings in the court of appeals are Albert Halprin, Gerald Murray, Robert Eckenrode, Gad Selig, Barbara Lent, NYNEX Information Solutions Group, and New York Telephone Company. In addition, Lawrence Friedman, James Jewett, William Tallent, and Coopers & Lybrand were named defendants in the district court.

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OPINIONS BELOW

The opinions of the court of appeals are not reported, but are reproduced in the appendix (1a and 3a). Opinions of the district court filed October 16, 1990 and July 26, 1991 are not reported, but are reproduced in the appendix (4a and 8a).

JURISDICTION

The court of appeals entered judgment dismissing the appeal for want of appellate jurisdiction on January 13, 1993. On February 23, 1993, the court of appeals issued an order denying petitioner's objection to the bill of costs. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTE AND COURT RULES INVOLVED

Section 1291 of the United States Code, provides, in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ., except where a direct review may be had in the Supreme Court. . . .

Rule 39(c), Federal Rules of Appellate Procedure, provides:

> By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

CONCISE STATEMENT OF THE CASE

Petitioner Rafferty is the plaintiff in two separate actions against NYNEX Corporation and various employees and affiliates. One, filed in the District of Columbia during 1987, alleges breach of his employment contract.[2] Subsequent to the filing of this action, Rafferty accepted employment in New York, where he paid telephone rates to New York Telephone ("NYT"), a subsidiary of NYNEX. His second lawsuit, filed in the Southern District of New York. in 1990, alleges a pattern of racketeering that resulted in overcharges in telephone rates.

Rafferty asserted that 18 U.S.C. §1964 conferred jurisdiction over the racketeering claims. 18 U.S.C. §1965 provided venue in the Southern District of New York. It appears that Rafferty could not achieve personal jurisdiction over most defendants in the District of Columbia.

The district court in the second action held: "it is not clear that plaintiff's claim as a NYT ratepayer falls within the bar of res judicata," but invited respondents ("NYNEX") to rebrief on the limited issue of causation under the RICO statute. [6a] The Court authorized Rafferty to file answering papers that were "similarly limited." [8a] When NYNEX's new brief reargued res judicata, Rafferty requested leave to respond on this issue. Although NYNEX's supplemental brief conceded that Rafferty did not file ratepayer claims in the first action, it asserted that he knew the relevant facts – a

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2 The original complaint alleged Clayton Act liability and wrongful discharge, but the court later dismissed these claims. On January 12, 1988, Rafferty's attorney filed an amended complaint that abandoned a Clayton Act count, but did not significantly expand any of his claims. None of the claims in this amended complaint involve adverse impacts on ratepayers or allege mail or wire fraud. At the time of the amended complaint, Rafferty had no basis to suspect any fraudulent transaction having an impact on him as a NYT ratepayer.

proposition that Rafferty would have shown to be false. The district judge denied Rafferty leave to respond [9a] and adopted NYNEX's reasoning. The court stayed Rafferty's ratepayer claims pending "apparently inevitable dismissal" once the District of Columbia litigation concludes. [23a]

On appeal, all parties urged the court of appeals to review the merits of the district court's indefinite stay, although NYNEX observed that "a significant question exists as to the Court's jurisdiction." Rafferty argued that the stay effectively terminated the litigation, but for the ministerial act of entering a judgment. As such, it was reviewable under the doctrine of practical finality[3], or in the alternative, as a collateral order. The court of appeals held that the doctrine of practical finality applied only where the stay purports to defer to a state court action. It rejected Rafferty's invocation of the collateral order doctrine without detailed explanation.

NYNEX submitted a bill of costs in the amount of $2776.52. Pursuant to Rule 39, Rafferty objected, claiming that the reasonable costs of reproducing necessary copies of the relevant parts of appellees' brief were only $58.80. The court of appeals summarily denied this objection. In this petition, Rafferty challenges NYNEX's right to tax a charge for "in-house typesetting." This charge did not reflect actual cost, but was based upon undocumented billing rates purportedly paid by clients of NYNEX's law firm. Moreover, the brief was not typeset at all, but was actually photostatically copied by an outside firm for an actual cost of less than 18 cents per page per copy.

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[3] This Court sets forth this doctrine in, among other cases, Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1982).

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THIS COURT'S JURISPRUDENCE ON APPELLATE FINALITY AND CREATES A CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT AND UNSETTLED ISSUE OF FEDERAL APPELLATE JURISDICTION.

Since Landis v. North American Co., 299 U.S. 248, 257 (1936), this Court and numerous courts of appeal have repeatedly subjected "immoderate" stays to appellate review. The court of appeals in this case disregards this jurisprudence to deny its jurisdiction over a stay issued "pending apparently inevitable dismissal." Because the court of appeals denies appealability, without reaching the merits of the stay its ruling has far-reaching implications. By withholding the ministerial act of entering final judgment, a district court could effectively immunize its actions from appellate review for an indefinite period.

The denial of appealability is especially harsh in this case. Most of the acts underlying Rafferty's ratepayer injury did not even occur until after the filing of Rafferty v. NYNEX. The happenstance of unrelated litigation among affiliated parties cannot properly deny an aggrieved plaintiff access to the federal courts. Yet, the district court relied on the defendants' mere suggestion that plaintiff allegedly knew the facts underlying his ratepayer claim at the time he filed a wrongful discharge action. Defendants articulated this argument in five pages of a supplemental brief that the court limited to a different issue.[4] [8a] The district court refused to credit

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[4] NYNEX's original brief argued that the court could dismiss the action as "duplicative litigation," relying on the abstention doctrine of Colorado River Water Conservation Dist. v. United States,

Rafferty's denial of such knowledge or even to permit him to address the issue as raised in the supplemental brief. [10a] By characterizing its dispositive action as an "indefinite stay," rather than a "dismissal," the court avoided the application of the precept of Conley v. Gibson, 355 U.S. 41, 45-46 (1957): that no case can be dismissed unless it "appears beyond doubt that [plaintiff] can prove no set of facts that would entitled him to relief."

There are two reasons to review this decision. First, the denial of jurisdiction departs from this Court's jurisprudence on appellate finality and frustrates the expeditious conclusion of litigation. This contradicts the basic purpose of the final order doctrine, which is to avoid, not to perpetuate, delay. Second, the decision creates a conflict among the circuits, as the Fifth, Eighth, Ninth, and Eleventh Circuits have held that indefinite stays can be reviewed.

A. Section 1291 Finality.

The decision of the district court is final because "it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978). According to the logic adopted in the district court, there is no contingency in the proceeding before the court in the District of Columbia that could revive Rafferty's claims.

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424 U.S. 800 (1976). Appendix on appeal ("App.") at A112. The Court declined to adopt this position. The opening brief also included a single paragraph referring to "claim and issue preclusion," with cross-references to seven pages, which includes a reference to "fraudulent rate requests" in a discovery motion made almost two years after the last amendment to the complaint in Rafferty v. NYNEX. App. at A114-15. The NYNEX court has not yet granted this motion.

Therefore, the entry of final judgment, while not yet executed, is a ministerial act.

The express purpose of the stay in this case is to allow proceedings in the District of Columbia to assume res judicata effect. In this regard, the stay resembles that reversed by the court of appeals decision affirmed in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 10 (1985). The plaintiff is "effectively out of court" and the "stay order amounts to a dismissal of the suit." *id.* The court of appeals asserts that the present case "does not raise the issues of federalism" present in Moses H. Cone because the stay purports to defer to a federal, not state, court.

This distinction does not eliminate, but actually reinforces, the need for appealability. The doctrines of abstention upon which the courts of first instance relied in Moses H. Cone and Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962) served countervailing values of federal-state comity that have no application here. In those cases, appellate review of the stay was appropriate notwithstanding the real possibility that the appellant could moot the need for federal litigation by obtaining adequate relief in state court. The decision in this case entertains no prospect for relief from any court – state or federal. But for the entry of judgment, announced to be "apparently inevitable," the petitioner is "effectively out of court."[5] The objective of avoiding "piecemeal litigation," the essential basis of the finality doctrine, has no application where there is no contingency that could

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[5] The prospect that the district court will lift the stay or recognize the non-duplicative nature of the previous litigation does not negate finality. The stay cannot be upheld "because conceivably the court that made it may be persuaded at a later time to undo what it has done." Landis, 299 U.S. at 257.

avoid, limit, or alter the issues presented for appellate review.

To deny finality on the present facts exalts form over substance, which this Court has consistently declined to do. In Gillespie v. United States Steel Corp., 379 U.S. 148, 153 (1964), this Court instructed the courts of appeal to give the requirement of finality a "practical rather than a technical construction" that considers "the danger of denying justice by delay."[6]

The sole authority relied upon by the court of appeals, Acton Corp. v. Borden, Inc., 670 F.2d 377 (1st Cir. 1982), predates this Court's decision in Moses H. Cone, as does the only other support offered in respondents' brief.[7] Indeed, the court of appeals in Acton Corp. expressly "cho[se] not to follow" the decision in favor of appealability that Moses H. Cone later affirmed. 670 F.2d 380. Although the stay in Acton Corp. deferred to another federal court, nowhere does the court of appeals suggest that this fact could distinguish its application of finality doctrine from the contrary position later affirmed by this Court in Moses H. Cone.

Acton Corp. is distinguishable for an even more fundamental reason. In Acton Corp., the stay was "provisional," made in anticipation of substantive action in the other federal court. The court of appeals relied heavily on the ability of the other court to address the

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[6] In Coopers & Lybrand, 437 U.S. at 477, the Supreme Court declined to extend Gillespie beyond the unique facts of that case, but these are closely analogous to those existing in the present litigation.

[7] Harmon Kardon, Inc. v. Ashley Hi-Fi, 602 F.2d 21 (1st Cir. 1979). NYNEX expressly concedes that the only authority it cites after 1983 (United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987)) relies upon Moses H. Cone, despite the fact that the alternative proceeding is before a federal forum.

merits, which has no application to the stay imposed on Rafferty:

> The district court made clear in its opinion that it simply did not wish to proceed "summarily" to trial. [footnote omitted] The district court left itself free to return to Acton's basic complaint, if, for example, the Ohio court should choose not to resolve the factual and legal issues. . . . 670 F.2d 379-380.

In the present case, the other federal court had made no attempt to exercise jurisdiction over the racketeering claims. There is no present expectation that the other court will ever consider their merits.

Following Landis, Catlin, Gillespie, and both before and after Moses H. Cone, courts of appeals for other circuits have consistently given a more practical interpretation to the jurisdictional requirement of finality. In Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971), the Court of Appeals for the Eighth Circuit invalidated a stay pending release from prison. The court of appeals recognized that "to arbitrarily deny even the bare opportunity to process his claim for an indefinite number of years could well render the legal process meaningless for this plaintiff." In Hines v. D'Artois, 531 F.2d 726, 730 (5th Cir. 1976), the court of appeals for the Fifth Circuit explained:

> A practical construction requires that when a plaintiff's action is effectively dead, the order which killed it must be viewed as final. Effective death should be understood to comprehend any extended state of suspended animation.

See In re Ramu Corporation, 903 F.2d 312, 318 (5th Cir. 1990); United States v. General Dynamics Corp., *supra*; Robbins v. Maggio, 750 F.2d 405, 413 (5th Cir. 1985), CTI-

Container Leasing Corporation v. Uiterwyk Corp., 685 F.2d 1284, 1287 (11th Cir. 1982), cert. denied, 459 U.S. 1173 (1983); McKnight v. Blanchard, 667 F.2d 477 (5th Cir. 1982). Until this case, district courts in the Second Circuit have assumed that "stay orders will be reversed when they are found to be immoderate or of an indefinite duration." United States v. Banco Cafetero Int'l, 107 F.R.D. 361, 366 (S.D.N.Y. 1985).

There is no question that this stay is both immoderate and indefinite in its duration. Rafferty v. NYNEX is no closer to final judgment than it was when the district court stayed this litigation almost two years ago.[8] In Hines, the court of appeals found that a prospective stay of 18 months to two years pending possible resolution by the Equal Employment Opportunities Commission was "immoderate" in length. 370 F.2d at 731. Any reasonable time to delay entry of final judgment has already lapsed.

B. The "Collateral Order" Doctrine

Since Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), this Court has consistently recognized that collateral orders are "final" for the purposes of 28 U.S.C. §1291. To qualify, a district court decision must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits," and (3) be "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand, 437 U.S. at 468 (1978). The conclusory assertion by the court of appeals that an indefinite stay is not a collateral order conflicts with settled authority from other circuits and is inconsistent with the jurisprudence of this Court.

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[8] The court in Rafferty v. NYNEX has scheduled no trial and conducted no status conferences during this period.

Specifically, the court of appeals disregards this Court's explanation in Moses H. Cone : this doctrine provides interlocutory review over stays pending dismissal on res judicata grounds. The portion of the opinion in Moses H. Cone that determines such stays to be "collateral orders" does not rely in any way on principles of federalism that could create an arguable distinction from the facts of the present case.

The decision of the district court clearly meets the first criterion announced in Coopers & Lybrand, since it conclusively determines that a lengthy stay will occur, as well as the fact that dismissal will follow the eventual entry of final judgment in Rafferty v. NYNEX.[9] "An order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits." Moses H. Cone, 460 U.S. at 12.

The importance of the stay is beyond reasoned dispute. The expressly expected effect, indeed the apparent object, of the stay is to deprive Rafferty of the timely opportunity to present his ratepayer claims in any federal court.[10] Where the court anticipates res judicata

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[9] The district court describes the stay as made "in contemplation of dismissal," but elsewhere suggests that dismissal after final judgment in Rafferty v. NYNEX is "apparently inevitable," *regardless* of the outcome in that case. [emphasis supplied] The prospect that the district court may correct its misapprehension of the Rafferty v. NYNEX litigation and "undo" the stay does not make its action any less final. Landis, 299 U.S. at 257. The order is not "inherently tentative" within the sense of that phrase in Coopers & Lybrand, because revision is not "reasonably . . . expected." Moses H. Cone, 460 U.S. at 13.

[10] Plaintiff does not concede that the district court could not transfer this action to the District of Columbia. He suggested transfer as an alternative in response to NYNEX's motion to dismiss and has moved for such transfer since the decision of the appeal. Rafferty also reserves the right to argue that the District of Columbia may

effect, its stay is an appealable collateral order. Terra Nova Ins. Co. v. 900 Bar, Inc., 887 F.2d 1213, 1219 (3rd Cir. 1989).

The expectation of res judicata effect aggravates the long delay imposed by the stay, which, standing alone, would raise an "important" question. Rule 1, Federal Rules of Civil Procedure, promises litigants "speedy . . . determination of every action." Congress recently enacted reporting requirements to compel disclosure of cases not terminated within three years of filing, a milestone this case will pass within two weeks of the filing of this petition. 28 U.S.C. §476(a)(1) (added Dec. 1, 1990). Rafferty's expressed concern that witnesses and documents might be lost in the intervening years of the stay is real, not hypothetical. The stay should be vacated even if it is only "conceivabl[e]" that delay could "forever deny his securing presently available evidence." Peterson, 452 F.2d at 756.

The propriety of the stay is entirely separate from the merits of Rafferty's ratepayer claims. There is absolutely no link between the evidentiary and legal factors relevant to the ratepayer claims and the propriety of the stay. *See* Praxis Properties, Inc. v. Colonial Savings Bank, S.L.A., 947 F.2d 49, 56 (3rd Cir. 1991). Indeed, the express acknowledgment that this stay is "pending apparently inevitable dismissal," makes it procedurally impossible for the district court ever to reach the merits.

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grant Rafferty leave to amend his complaint nunc pro tunc a date prior to the expiration of any time bar. The district court appears to assume this possibility. ("If Judge Greene erred in refusing to allow Rafferty to assert these claims in the case before him, Rafferty has a remedy in an appeal to the Court of Appeals for the District of Columbia Circuit." (17a))

Finally, the merits of the stay are effectively unreviewable on appeal from the eventual final judgment. The stay will have run its course, evidence may be lost and the parties will have foregone their expectation of timely adjudication on the merits of their dispute. It is impossible to dispute that there will be no opportunity to review the stay or to grant a timely remedy after the fact. Peterson, 452 F.2d at 756.

II. THE DECISION OF THE COURT OF APPEALS SANCTIONS A SIGNIFICANT DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS IN THE DISTRICT COURT

In determining this petition, the Court considers whether the challenged appellate ruling sanctions a departure by the lower court from the "accepted and usual course of judicial proceedings." Supreme Court Rule 10.1(a). The underlying opinions in the district court reflect such a departure.

The district court ascertained the alleged "relationship" between this case and Rafferty v. NYNEX based on the untested suggestion of the defendants. The court did not review the docket of the previous lawsuit or transfer the case to the judge in the District of Columbia who could have made such a determination based on the entire record. It accepted defendants' representations about what plaintiff knew at the time of the prior lawsuit without any evidentiary proceeding or oral argument. Indeed, the court relied heavily on aspects of a supplemental brief that clearly exceeded the "limited" rebriefing that it authorized. Plaintiff had no reasonable opportunity to demonstrate that the cases were, in fact, not duplicative for purposes of res judicata.

The course of these proceedings has two results, each of which is "unusual" and "unacceptable." First, it

denies a plaintiff timely access to a federal court based on the mere happenstance of pending litigation that is in fact unrelated. Second, by staying (rather than transferring, consolidating, or even dismissing) this case, the district court unnecessarily prolongs the pendency of the litigation. This effect is inimical to the salutary purposes of "docket control" that stays ordinarily seek to promote. *See* Moses H. Cone, 460 U.S. at 10.

[Calculation of Taxable Costs]

III. THE LOCAL RULES OF THE COURT OF APPEALS FAIL TO COMPLY WITH THE EXPRESS REQUIREMENTS OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Until 1986, Rule 39, Federal Rules of Appellate Procedure, expressly authorized the local rules of each court of appeals to provide for the recovery of the costs of producing the necessary copies of briefs and other materials authorized by Rule 30(f). In the absence of a contrary local rule, such costs were taxable "at rates not higher than those generally charged for such work in the area where the clerk's office is located." In 1986, however, an amendment to Rule 39 required each court of appeals to fix maximum rates "[b]y local rule." It is now mandatory that the maximum rates not exceed the amounts "generally charged" in the area. The new rule also requires the maximum rates to "encourage the use of economical methods of printing and copying."

PROVISIONS REGARDING COSTS IN LOCAL RULES

Circuit	Local Rule	Limited to actual cost?	Extra costs allowed for printing?	Maximum price per page-copy (20 copies)
1st	39			see clerk
2nd	39	app. only		
3rd	20		yes	$0.20 print $0.25 phot
4th	39	yes	yes	$0.50 print $0.20 phot
5th	39	yes		$0.25
6th	26	yes	no	$0.25
7th	39			see clerk
8th	28A			
9th	39-1	yes	no	$0.20
10th	39.1	yes		$0.50
11th	39-1	yes		see clerk
DC	16	yes	no	$0.15
Fed.	39	yes	no	$0.38

Today, only eight of the thirteen courts of appeal have complied with the directive to fix maximum rates within their local rules. The rules of three additional circuits refer litigants to the clerk for updated fixed maximum rates, but the rules of the Second and Eighth Circuits make no reference to maximum rates at all. The

language of the local rules expressly limits charges to "actual costs" in only eight circuits; in the Second Circuit, this principle is expressed only with regard to appendices. Caselaw regarding the calculation of taxable costs reveals numerous conflicting interpretations of Rule 39. These conflicts among the circuits affect virtually every appellate proceeding in which costs are taxed.

The court of appeals summarily denied Rafferty's objections to NYNEX's bill of costs. Rafferty based his objections on the inclusion of unnecessary material in the brief and appendix, the failure to comply with the procedures of Rule 30(b) for making such designations, the use of a hypothetical "billing rate" for typesetting, rather than actual cost, and for the charge for typesetting, when the brief was actually photostatically copied. Rafferty recognized that the Second Circuit, in conflict with other circuits, permits the recovery of additional costs when the brief is printed, rather than photocopied. Young v. Matsushita Electric Industrial Co., 951 F.2d 509 (2nd Cir. 1991); *but see* 6th Cir. Rule 26, 9th Cir. Rule 39, D.C. Cir. Rule 16.

The issue meriting review by this Court is whether the court of appeals can allow the prevailing party to tax an undocumented charge for "in house typesetting," when the brief was actually photostatically copied. The taxation of the charges is objectionable for three reasons. First, they are not "costs," but billing rates based only upon the alleged willingness of clients to pay attorney with regard to whom they occupy a position of trust. Second, the charge is associated with the production of an original, not the making of copies, which is the only "cost" whose recovery Rule 39 authorizes. Finally, the charges exceed the maximum of each of the court of appeals that, unlike the Second Circuit, has complied with the requirement to fix rates for copying.

Absence of Documented Costs. In the Second Circuit, the "expenses of reproduction which are clearly recoverable as costs when a commercial printer is used are also recoverable when incurred through in-house methods." PepsiCo, Inc. v. Swan, Inc., 720 F.2d 746 (2d Cir. 1986). However, NYNEX claim is not based on "cost" but on "billing rates." According to defense counsel, the eight hour charge for "typesetting" at $44 per hour "is constant no matter what part of the brief is being typeset and the rate cannot otherwise be broken down by page. . . "

The mere fact that a law firm may have clients willing to pay claimed rates does not justify a statement of "costs." Otherwise a firm with wealthier clients would receive higher rates than one whose clients scrutinized expenses. As a general matter, clients repose trust in their attorneys and may not scrutinize incidental charges that are a small part of their attorneys' compensation. By contrast, the non-prevailing party in an appeal is ordinarily an adversary without other financial obligations or relationships of trust with the taxing party.

Claim for In-House Production of Original. The use of a computer or word processor for its ability to produce typographic fonts is not physical "typesetting." Although representations by defense counsel are both incomplete and inconsistent, it appears that the law firm produced an original on in-house computers. A receipt from an outside print shop indicated that it "Xeroxed" (*i.e.*, photostatically duplicated) the briefs. This is inconsistent with the representation in the verified bill of costs that the brief was "typeset," as well as the subsequent response to plaintiff's objection, which claimed that the "photo-offset" process produced the copies.

Other circuits have expressly excluded the costs of word processing or of composing typographic fonts from

recoverable "in-house expenses." The Court of Appeals for the Seventh Circuit has held that a firm "may recover only the additional cost of reproduction: the expense of copying, and of dedicated equipment (such as 1200 dpi printer-binders) that make copies but not originals." Martin v. United States, 931 F.2d 453 (7th Cir. 1991). Defense counsel identify no such dedicated equipment.

The Federal Circuit has interpreted PepsiCo, *supra*, a decision of the Second Circuit, as not extending recovery of in-house expenses to the production of the original brief. CTS Corp. v. Piher International Corp., 754 F.2d 972, 973 (Fed. Cir. 1984); *see also* Intercontinental Apparel, Inc. v. Danik, Inc., 777 F.2d 775, 776 (D.C. Cir. 1985) (expenses of composing original may not even be recovered indirectly through a charge for copies).

Excessiveness of Charge. The appellees charged more than $10 per page. This significantly exceeds the rate authorized by any of the courts of appeals that have fixed maximum rates.

The 1986 revisions to Rule 39 promised appellate litigants notice of maximum rates for taxable costs that would promote economic reproduction of briefs and appendices. This Court should reverse the court of appeals' denial of Rafferty's objections to NYNEX's excessive and unjustified claims of taxable costs.

CONCLUSION

For all these foregoing reasons, the Court should issue the writ of certiorari.

Scott J. Rafferty

April 13, 1993

APPENDIX

SCOTT J. RAFFERTY, Plaintiff-Appellant, v. LAWRENCE FREEDMAN, JAMES JEWETT, WILLIAM TALLENT, COOPERS & LYBRAND, Defendants, ALBERT HALPRIN, GERALD MURRAY, ROBERT ECKENRODE, GAD SELIG, BARBARA LENT, NYNEX INFORMATION SOLUTIONS GROUP, NEW YORK TELEPHONE, COOPERS & LYBRAND, Defendants-Appellees

Docket No. 92-7519

Filed January 13, 1993

This is a pro se appeal from two orders of the United States District Court for the Southern District of New York, Haight, J., which (1) stayed, in the exercise of the court's discretion, most of appellant's Racketeer Influenced and Corrupt Organizations (RICO) and common law claims, (2) dismissed on the merits appellant's RICO claims to the extent they asserted injury to appellant as a litigant in Rafferty v. NYNEX, and (3) denied appellant's motion for leave to file an amended complaint.

This cause came on to be heard on the transcript of record from said district court and was argued by appellant pro se and by counsel for the appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal is DISMISSED for lack of appellate jurisdiction.

The district courts decision to grant the stay is not appealable because it is not a final decision. *See* 15 Charles A. Wright, Arthur R. Miller and Edward H. Cooper, Federal Practice and Procedure, § 3914.13 (1992).

This discretionary decision is neither final nor equivalent to an injunction and thus provides no basis for an appeal under either 28 U.S.C. §1291 or §1292. *See*, e.g., Acton Corp. v. Borden, Inc., 670 F.2d 377, 380 (1st Cir. 1982). Rafferty's reliance on Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 1460 U.S. 1 (1983), is misplaced. The order at issue here does not raise the issues of federalism present in that case. The collateral order exception is inapplicable because Rafferty cannot make the three-part showing required to invoke that doctrine. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

The district court's decisions to dismiss one of Rafferty's claims of RICO injury and to deny him leave to file an amended complaint are also not appealable. An order that adjudicates fewer than all of the claims remaining in the action is not a final order unless the court directs the entry of a final judgment as to those claims "upon an express determination that there is no just reason for delay." Fed. R. Civ. Pro. 54(b); see also Chapple v. Livinsky, 961 F.2d 372, 374 (2d Cir. 1992). This Court, therefore, is without jurisdiction to hear Rafferty's appeal.

/s/
Thomas J. Meskill, Chief Judge
Jon O. Newman, U.S.C.J.
James L. Oakes, U.S.C.J.

SCOTT J. RAFFERTY, Plaintiff-Appellant, v. LAWRENCE FREEDMAN, JAMES JEWETT, WILLIAM TALLENT, COOPERS & LYBRAND, Defendants, ALBERT HALPRIN, GERALD MURRAY, ROBERT ECKENRODE, GAD SELIG, BARBARA LENT, NYNEX INFORMATION SOLUTIONS GROUP, NEW YORK TELEPHONE, COOPERS & LYBRAND, Defendants-Appellees

Docket No. 92-7519

Filed February 23, 1993

Treating the objection filed by appellant pro se Scott J. Rafferty as a motion to disallow appellees itemized and verified bill of costs,

Upon consideration thereof, it is

Ordered that the motion be and it hereby is denied.

/s/
Thomas J. Meskill, Chief Judge
Jon O. Newman, U.S.C.J.
James L. Oakes, U.S.C.J.

U.S. Court of Appeals
for the Second Circuit

SCOTT J. RAFFERTY, Plaintiff, v. ALBERT HALRPIN, GERALD MURRAY, ROBERT ECKENRODE, LAWRENCE FREEDMAN, GAD SELIG, JAMES JEWETT, WILLIAM TALLENT, BARBARA LENT, NYNEX INFORMATION SOLUTIONS GROUP, NEW YORK TELEPHONE, COOPERS & LYBRAND, Defendant

No. 90 Civ. 2751 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

October 12, 1990, Decided October 16, 1990, Filed

JUDGES: Charles S. Haight, Jr., United States District Judge.

OPINION: MEMORANDUM OPINION AND ORDER

Plaintiff in this action alleges subject matter jurisdiction under the Civil RICO statute, 18 U.S.C. § 1964(c). Complaint, para. 4. While the complaint does not allege jurisdiction under the diversity statute, 28 U.S.C. §1332, plaintiff relies upon complete diversity of citizenship in resisting defendants' present motions to dismiss the complaint, and the complaint appears to allege complete diversity. Plaintiff alleges claims under all four subsections of RICO, § 1962(a)-(d), and also asserts claims for misrepresentation and defamation.

All defendants move to dismiss the complaint on various grounds. By this Memorandum and Order and Court directs further briefing on one of those grounds. 18 U.S.C. § 1964(c) requires a civil RICO plaintiff to plead and prove that he was "injured in his business or property by reason of a violation of section 1962 . . . " in his complaint plaintiff sought to comply with the requirement by alleging at para. 130: These acts injured plaintiff in his business and property. This injury includes damage to reputation before and after the commencement

of this litigation, exposure to hatred, ridicule, and embarrassment, injury to honor and integrity, mental anguish, humiliation, contempt, and ridicule. In particular, the false denial, signed by Struve, that NYNEX had violated the consent decree substantially impaired plaintiff's employment as an attorney and within the telecommunications industry. That allegation appears in the first count of the complaint, alleging a violation of § 1962(a). The damages recited in para. 130 of the complaint are reprised in the three remaining RICO counts. *See* paras. 133, 136, and 140.

Defendants demonstrated in their briefs in support of the motions to dismiss the complaint that injuries such as mental anguish and emotional distress are not cognizable injuries under RICO. *See*, e.g., Main Brief for the NYNEX defendants at 19-21 and cases cited. In his opposing brief, plaintiff does not contest that issue. Rather, he asks that his complaint be read so as to allege entirely different kinds of damage: injury as a New York Telephone ratepayer; injury as a "Telco competitor"; injury as a "Telco employee"; injury as a Myerson & Kuhn client and employee; and injury as a litigant. Plaintiff's brief at 2-20.

Contrary to plaintiff's protestations, these claimed injuries to "his business or property" constitute a total revision of the damages claimed in the complaint. Defendants correctly observe that a pleading cannot be amended by a brief. The amendment of pleadings is governed by Rule 15, Fed.R.Civ.P. Plaintiff's technical impropriety could be cured by granting him leave to move to amend his complaint under that rule. However, there is no purpose in that exercise if, as defendants also argue in their reply brief, none of the claimed categories of injury is cognizable under RICO or available to plaintiff against the bar of re judicata.

Defendants' reliance upon res judicata arises out of District Judge Greene's decisions in Rafferty v. NYNEX Corporation, C.A. No. 87-1521(HHG) (D.D.C.) Without ruling upon the res judicata defense at this time, it does appear that certain of plaintiff's recently asserted claims of injury in the case at bar may be foreclosed by Judge Greene's grant of partial summary judgment in his Memorandum and Order dated July 23, 1990. But it is not clear that plaintiff's claim as a New York telephone ratepayer falls within the bar of res judicata.

As to that particular claim, the NYNEX defendants make two points in their reply brief. First these defendants contend that the complaint does not sufficiently allege a causal connection between any wrongdoing on the part of the pubic utility and the raising of rates by the regulatory agency, as required by County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1990). Secondly, defendants argue: whatever injury plaintiff may have suffered as a ratepayer is plainly de minimis when compared with even his out-of-pocket expenses in suing for its recovery. It is obvious that plaintiff is asserting standing as a ratepayer, not because he wishes in good faith to recover the de minimis sums involved in his allegations, but as a means of pursuing his ongoing vendetta against NYNEX and its subsidiaries and employees. Reply brief at 8 (footnote omitted).

A least one federal court has held, in the circumstances of the particular case, that monetary loss may be so insignificant as to fail to satisfy the § 1964(c) threshold requirement. *See* Howe v. Reader's Digest Association, Inc., 686 F. Supp. 461, 465 (S.D.N.Y. 19788) (Mukasey, J.) ("Curiously, the plaintiff does not claim to have incurred any out-of-pocket expense in making these [telephone] calls, but even if he had such de minimis expenses do

not amount to injury 'in business or property' cognizable under 18 U.S.C. § 1964(c).")

However, it is not clear that a public utility, subject to civil RICO claims as

the Second Circuit held in County of Suffolk, may consistent with public policy dismiss even an individual ratepayer's claim as de minimis. Five individual ratepayers participated in the County of Suffolk litigation, albeit in the form of a putative class action. I also learn from the NYNEX defendants' reply brief that rate-making fraud claims similar to that at bar are pending before Judge Wood of this Court. Wegoland, Ltd. v. NYNEX Corp., S.D.N.Y., 90 Civ. 496 (KMW); Roazem v. NYNEX Corp., S.D.N.Y., 90 Civ. 1914 (KMW). *See* Reply Brief at 27 fn. 29. I infer from what defendants say that the ratepayers in those cases are asserting RICO claims; and that defendants have moved to dismiss them on the ground inter alia that "plaintiff's claim involves an indirect and tenuated chain of causation not within the RICO statute." Id. at 29 fn.

If defendants [*6] are correct in that contention, plaintiff at bar may not have a viable RICO claim as a ratepayer, even if he were permitted to amend his complaint to assert one.

Defendants suggest that they make available to this Court copies of their briefs in the Wegoland and Roazam cases, where apparently motions to dismiss are pending. I direct that defendants do so, but that they include in the package all briefs filed on the pertinent issue in those cases. The NYNEX defendants are directed to file and serve such additional material on or before October 26, 1990. They may accompany that submission with an addition of memorandum of law, addressed to the particular point discussed herein, if they are so

advised. Plaintiff may file answering papers, similarly limited, on or before November 9. Defendants may have until December 16 to reply.

The several motions to dismiss raise a number of other questions, none of which I reach at the present time. I think it is better, before addressing all the issues, to have additional briefing on this particular point.

It is SO ORDERED.

SCOTT J. RAFFERTY, Plaintiff, v. ALBERT HALPRIN, GERALD MURRAY, ROBERT ECKENRODE, LAWRENCE FREEDMAN, GAD SELIG, JAMES JEWETT, WILLIAM TALLENT, BARBARA LENT, NYNEX INFORMATION SOLUTIONS GROUP, NEW YORK TELEPHONE, COOPERS & LYBRAND, Defendant

No. 90 Civ. 2751 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

July 16, 1991, Decided; July 26, 1991, Filed

JUDGES: Charles S. Haight, Jr., United States District Judge.

OPINION: MEMORANDUM OPINION AND ORDER

In this action asserting civil RICO and related claims, certain defendants move to dismiss the complaint under Rule 12(b)(6), Fed.R.Civ.P., for failure to state a claim upon which relief can be granted, or in the alternative for a stay of proceedings. The motion has been fully briefed and is now ripe for decision. n1

n1 In a Memorandum Opinion and Order dated October 12, 1990, familiarity with which is assumed, the Court directed a further round of briefs with respect to the viability of plaintiff Rafferty's claimed injury as a New York Telephone Company ratepayer. That Opinion

set forth a schedule for the filing of the moving defendants' supplemental brief, plaintiff's answering brief, and defendants' reply brief. Slip op. at 5. Consistent with that timetable, defendants filed their reply supplemental brief on November 30, 1990. Plaintiff has written a letter to the Court dated June 26, 1991, characterizing defendants' November 30, 1990 brief as filed "without leave of Court" and asking leave to file a further brief. Plaintiff's suggestion that defendants filed their reply brief "without leave of Court" is puzzling, since defendants complied with the specific directions of the Court's October 12, 1990 order. The issues have been sufficiently briefed and plaintiff's request to file another brief is denied.

Background

NYNEX Corp. (" NYNEX") is a regional telephone company subject to the consent decree entered on August 24, 1982 by the United States District Court for the District of Columbia (Harold H. Greene, District Judge) in the AT & T antitrust case. United States v. American Tel. & Tel., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom Maryland v. United States, 460 U.S. 1001 (1983).

In April 1986, NYNEX acquired Telco Research Corp. ("Telco"), a marketer of telecommunications management software and consulting services. NYNEX recruited plaintiff Scott J. Rafferty, an attorney appearing pro se in this action, to serve as its second senior officer and the head of its consulting division.

On November 10, 1986, Telco's management discharged Rafferty. Rafferty has been engaged in a one-man prosecution of NYNEX and Telco ever since. n2

n2 The analogy is plaintiff's. He described himself, in a filing in the case before Judge Greene referred to in text, as "an uncompensated one-man prosecutor of NYNEX Corporation."

In 1987 Rafferty filed an action in the United States District Court for the District of Columbia against NYNEX and Telco. He alleged that Telco fired him as a result of inquiries he made to determine whether Telco

was violating the AT&T consent decree. This action (hereinafter "Rafferty v. NYNEX ") was assigned to District Judge Greene. In Rafferty v. NYNEX Rafferty alleged six claims against NYNEX and Telco, as follows: n3

n3 I base this summary of Rafferty's six claims in Rafferty v. NYNEX on Judge Greene's Memorandum Opinion in that case dated July 23, 1990, which granted in part and denied in part the motion of NYNEX and Telco for summary judgment.

First Claim: Antitrust. Rafferty alleged that his termination by Telco for seeking legal advice and for refusing to acquiesce in violations of the consent decree, as well as other actions taken by Telco and NYNEX, violated the consent decree in AT&T and accordingly also violated § 4 of the Clayton Act.

Second Claim: Third-Part Beneficiary. Rafferty alleged that the consent decree was a contract binding on NYNEX, and that NYNEX employees were third-party beneficiaries of that contract. He further claimed that his termination by Telco violated the decree because it resulted from his efforts to clarify and rectify NYNEX's breaches of the decree, and that as a third-party beneficiary he was entitled to recover.

Third Claim: Written Employment Contract. Rafferty claimed that he entered into an oral two-year non-cancelable employment contract with NYNEX and Telco which they breached by terminating him without cause. In resisting that claim, NYNEX and Telco relied upon the statute of frauds.

Fourth Claim: Oral Contract Modification. Rafferty claimed that under a modification of the oral contract alleged in his third claim, Theodore Engkvist, a NYNEX executive and chairman of the Telco board of directors,

promised him in an August 29, 1986 telephone conversation that if Rafferty's division was ever closed, he would be offered employment with another NYNEX company, but that when Telco was later closed, no such offer was forthcoming.

Fifth Claim: Misrepresentation. Rafferty claimed that NYNEX and Telco had made two misrepresentations to him: first, that Engkvist told Rafferty that the Department of Justice had approved and authorized NYNEX's acquisition of Telco; and second, that James Jewett, the president and vice-chairman of the board of Telco, had told him through an executive recruiter that Telco's consulting division had revenues of $ 1 million a year.

Sixth Claim: Wrongful discharge. Rafferty claimed that NYNEX officials caused Jewett to discharge him because he sought legal advice as to the application of the decree and because they knew that he would not conduct or participate in unlawful activities for which he was an essential participant. Rafferty further alleged that his manner of termination constituted retaliation for his refusal to participate in these illegal activities or to conceal them from the Department of Justice.

Following extensive discovery, NYNEX and Telco moved for summary judgment dismissing all these claims. In a Memorandum Opinion and Order dated July 23, 1990, Judge Greene granted summary judgment dismissing the first, second, fourth, and fifth claims. He denied summary judgment in respect of the third and sixth claims. In a Memorandum and Order dated September 6, 1990 Judge Greene denied Rafferty's motion for reconsideration of those parts of the July 23, 1990 Order dismissing the fourth and fifth claims.

Insofar as the record before this Court reveals, no final judgment has been entered in respect of the dis-

missed claims, under Rule 54(b), Fed.R.Civ.P., or otherwise. Rafferty's third and sixth claims against NYNEX and Telco, as to which summary judgment was denied, are presumably pending trial.

Rafferty filed his action in this Court on April 23, 1990. The complaint alleges that Rafferty is a Maryland citizen and that Telco discharged him after he questioned NYNEX's compliance with a consent decree." Rafferty further alleges that he "is, and was at the times relevant to this complaint, residential ratepayer of NYT [New York Telephone]." Complaint para. 8. Individual defendants Albert Halprin, Gerald Murray, Robert Eckenrode, Lawrence Freedman, Gad Selig, and Barbara Lent are alleged to be, or at the pertinent times to have been, officers, employees, or attorneys of NYNEX. Individual defendants Jewett and Tallent are alleged to have been officers of Telco.

The corporate defendant NYNEX Information Solutions Group is alleged to be a New York corporation that "controls the businesses owned by Devco [NYNEX Development Company], including Telco." Complaint at para. 17. Plaintiff sues NYNEX Information Solutions Group as "Devco's successor and alter ego." Ibid. .

The corporate defendant New York Telephone ("NYT") is alleged to be a New York corporation subject to the regulation of the State Commissions in New York and Connecticut as well as to regulations promulgated by the Federal Communications Commission. As noted, plaintiff alleges that he is a ratepayer of NYT. The complaint alleges that NYNEX caused NYT to understate its true earnings and understate the value of its plant "in order to obtain higher regulated rates." Complaint at para. 20.

Rafferty's complaint in this Court contains six counts. The first four counts allege violations of the RICO statute: 18 U.S.C. §§ 1962(a), (b), (c), and (d), respectively.

The alleged RICO enterprise is the " NYNEX Family of Companies" an enterprise "whose primary line of business is exchange telecommunications," and includes "more than fifty corporations, as well as agents, attorneys, and other persons who act in concert with those corporations." The NYNEX enterprise "adopted an unusual corporate structure" in order to "reduce or to avoid effective regulatory scrutiny . . ." Complaint at para. 6. Defendants are alleged to have conducted a pattern of racketeering activity including the following schemes: The Telco Research schemes; subsidized services for large customers; procurement fraud at NYT and New England Telephone ("NET"); and various cover-up schemes.

The RICO allegations charge a pattern of racketeering activity beginning in or about 1985 which substantially corresponds to the conduct of which Rafferty complained in Rafferty v. NYNEX, before Judge Greene. Thus the complaint at bar alleges the acquisition of Telco by NYNEX; the recruitment of Rafferty; false representations made to Rafferty; and Rafferty's subsequent termination and alleged retaliation against him. Complaint, paras. 24-48. The complaint further alleges that NYNEX, through Telco, collected payments for products sold and services rendered in violation of the consent decree; and disregarded or sought to evade Rafferty's advice that Telco and NYNEX were breaking the law. Id. at paras. 49, 58. Additional conduct in violation of the consent decree and applicable regulations is alleged at paras. 59-86. The alleged conduct occurred for the most part in 1985, 1986 and 1987. Various cover-up schemes are alleged at paras. 87-100. Misconduct in con-

nection with the litigation before Judge Greene is alleged at para. 101-111.

The predicate RICO acts are alleged to include violation of the mail fraud statute, 18 U.S.C. § 1341; the wire fraud statute, 18 U.S.C. § 1343; fraud in the sale of securities; violation of the Hobbs Act, 18 U.S.C. § 1951; the Travel Act, 18 U.S.C. § 1952; and conduct characterized as "obstruction of justice" and "obstruction of criminal investigation."

The fifth count of the complaint is for common law misrepresentation. para. 141 alleges: "Defendants' activities, including the failure to inform Rafferty of the illegality of the consulting activities he was being hired to direct, state a claim for misrepresentation at common law."

The sixth count sounds in common law defamation. para. 143 alleges that defendants have made and caused to be made statements to the press and potential employers of plaintiff that are not true and are likely to cause scorn for or aversion to plaintiff.

The present motion to dismiss is made by defendants Murray, Eckenrode, Lent, NYNEX Information Solutions Group, and NYT.

Discussion

In addition to challenging the substantive viability of Rafferty's claims, the moving defendants contend that, given the litigation in Rafferty v. NYNEX, the claims are barred by res judicata or, in the alternative, that proceedings in this Court should be stayed pending further litigation in the District of Columbia. I address those contentions first, since if they are well founded, there is no need to reach the other issues.

If Rafferty v. NYNEX had been litigated to a final judgment, Rafferty's RICO claims in this Court would be barred by res judicata.

Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); see Brown v. Felsen, 442 U.S. 127, 131 (1979); Saud v. Bank of New York, 929 F.2d 916, 918-19 (2d Cir. 1991); NLRB v. United Technologies Corp., 706 F.2d 1254, 1259 (2d Cir. 1983). Saud squarely holds that a RICO claim, not raised in a prior action between the parties or their privies, is barred by res judicata if it could have been asserted. Rafferty was the plaintiff in Rafferty v. NYNEX, as he is here; and the defendants at bar are indisputably privies of either NYNEX or Telco, the defendants in the prior action.

It is necessary to recall that in his initial brief opposing defendants' motion to dismiss, Rafferty changed his theories of RICO injury "in his business or property," 18 U.S.C. § 1964(c). The complaint alleges injuries such as mental anguish and emotional distress, which as plaintiff now concedes are not cognizable under RICO. Rafferty's brief now claims RICO injury as a NYT ratepayer; as a "Telco competitor;" as a "Telco employee;" as a "Myerson & Kuhn client and employee;" and as a litigant (the last being a reference to "the conduct in which defendants have engaged before Judge Greene and the Court of Appeals," brief at 19). This Court commented on Rafferty's revised theories of RICO injury in its prior Opinion at slip op. 2-3.

Construing plaintiff's brief as setting forth the contents of an amended complaint Rafferty would like to file under Rule 15, the issue for res judicata analysis

becomes whether these claims of RICO injury were or could have been raised in Rafferty v. NYNEX.

I will consider first Rafferty's claim of injury as a NYT ratepayer. n4

n4 Rafferty alleges in his complaint that he is a citizen of Maryland. His business address is in the District of Columbia. In those circumstances, it is surprising to read in para. 8 of the complaint that "Rafferty is, and was at times relevant to this complaint, a residential ratepayer of NYT." But on a motion to dismiss I accept as true the factual allegations of the complaint; and the moving defendants do not suggest otherwise in their papers.

It is readily apparent from plaintiff's allegations against NYNEX and Telco in Rafferty v. NYNEX that, assuming those allegations to be true, Rafferty knew or could easily have deduced that one consequence of the defendants' conduct was the imposition of improper rates. Indeed, in November 1989 Rafferty submitted to Judge Greene an order which, had the judge signed it (he did not) would have "deemed established" through prior proceedings that

through its subsidiaries Telco Research Corporation and New York Telephone, NYNEX violated the consent decree and state and federal regulations by subsidizing virtual network offerings (known as Project Vanguard or One-of-a-Kind). Gerald Murray and other persons employed by or associated with NYNEX conducted and participated in activities in a pattern of racketeering, including (1) the knowing use of the mails and of telephone communications to further a scheme of fraudulent rate requests, (2) travel in interstate commerce for the purpose of carrying out unlawful activities, (3) interfering with commerce by placing partners of Myerson & Kuhn in fear of economic loss unless they discharged plaintiff, (4) omitting to disclose material facts in

connection with the sale of registered securities, and (5) concealing evidence in a federal proceeding. (emphasis added).

Rafferty's application to Judge Greene would, if granted, have introduced into Rafferty v. NYNEX almost all the theories of RICO injury he now seeks to assert in this Court. The order Rafferty presented to Judge Greene would also have permitted him to amend his complaint for a second time. NYNEX and Telco opposed that request on the ground, among others, that it was untimely; and, in the words of the main brief of the moving defendants at bar at 14: "Judge Greene did not sign the proposed order which would have permitted plaintiff to inject RICO claims into Rafferty v. NYNEX ." If Judge Greene erred in refusing to allow Rafferty to assert these claims in the case before him, Rafferty has a remedy in an appeal to the Court of Appeals for the District of Columbia Circuit. Thus there is force to defendant's contention that it would be inappropriate to permit Rafferty to avoid unwelcome rulings in a forum he selected by the simple expedient of reasserting the claims in a different forum. That procedural contention furnishes a separate basis for dismissing most of the RICO claims here. But I will ground the decision on substantive res judicata analysis. That requires consideration of whether the claims of RICO injury Rafferty seeks by his brief to assert in this Court could have been asserted in timely fashion before Judge Greene in Rafferty v. NYNEX.

The Second Circuit said in Saud v. Bank of New York, supra that "as a general rule, newly discovered evidence does not preclude the application of res judicata." Exceptions to that rule exist "when that evidence was either fraudulently concealed or when it could not have been discovered with due diligence." 929 F.2d at

920. A non-asserted claim is barred by res judicata even in the face of alleged newly discovered evidence if it appears that even without the alleged newly discovered evidence, the plaintiff had sufficient notice at the time of filing the original action or during its pendency "of the essential facts that are now alleged in support of his RICO complaint." Ibid.

As for Rafferty's claim of RICO injury as a NYT ratepayer, it is apparent that he knew enough at the time he filed Rafferty v. NYNEX to include a ratepayer claim. The "essential facts" alleged against NYNEX and Telco were that they were violating the AT&T consent decree, a necessary consequence of which would be ultimate imposition of excessive rates which that decree was intended to prevent.

Rafferty's second and third theories of RICO injury are injury as a Telco competitor (also characterized as fraudulent recruitment), and injury as a Telco employee (further characterized as "fraud and extortion at time of discharge"). It requires no analysis to show that these claims arise out of the same essential facts alleged in Rafferty v. NYNEX, and were known to Rafferty when he filed that action.

In Saud the Second Circuit held that awareness of possible fraud "during the pendency" of the prior action gives rise to the bar of res judicata even though plaintiff did not know "the full extent" of the alleged fraud at the time the prior action was commenced; in the latter circumstance, a duty of further investigation arises. 929 F.2d at 920-21. In the case at bar, it is clear that Rafferty entertained suspicions of the alleged RICO wrongdoing of NYNEX and Telco early in the pendency of Rafferty v. NYNEX. Rafferty moved for leave to file an amended complaint in that action on January 12, 1988. During the course of depositions, Rafferty wrote to counsel for

NYNEX on August 24, 1989 and stated "that I completed my pre-filing investigation of potential RICO claims against NYNEX months ago." The completion of Rafferty's RICO investigation "months" before August, 1989 was presumably preceded by the investigation itself. In these circumstances, Rafferty's first three claims of RICO injury will be barred by res judicata as soon as a final judgment is entered in Rafferty v. NYNEX .

Rafferty's fourth claim of RICO injury is as a "Myerson & Kuhn client and employee." That claim is advanced in a section of Rafferty's brief which begins on page 13. Rafferty says that the New York law firm of Myerson & Kuhn (now dissolved) "agreed to represent [Rafferty] in consideration for [sic] his acceptance of employment at the firm." The brief states that on November 14, 1988, an attorney of Myerson & Kuhn "rendered legal advice to Rafferty in connection with his case," id. at 14, and that Rafferty planned to join the Myerson & Kuhn firm by December 1. Id. at 15. Rafferty's brief charges, in substance, that defendants Halprin and Murray combined their efforts to bring about the firm's termination of Rafferty's employment when Rafferty refused to agree to stop cooperating with the Department of Justice in respect of NYNEX inquiries. Myerson & Kuhn terminated Rafferty on November 29, 1988. Id. at 16.

Rafferty could not have known of Myerson & Kuhn's decision to terminate him before it occurred, at the end of November, 1988. Because it is problematical whether Judge Greene would have permitted a further amendment to Rafferty's complaint in Rafferty v. NYNEX to add that claim at that stage of the litigation, I am not prepared to hold that Rafferty's fourth alleged form of RICO injury will become barred by res judicata

upon the entry of a final judgment in Rafferty v. NYNEX.

Rafferty's final theory of RICO injury is as a litigant in Rafferty v. NYNEX. He attacks the conduct of NYNEX, Telco, the defendants at bar, and their attorneys during the litigation before Judge Greene and before the Court of Appeals for the District of Columbia Circuit. That conduct is alleged to constitute "obstruction of justice" and "obstruction of criminal investigation." Presumably the predicate acts are said to arise out of violations of 18 U.S.C. § 1503 (relating to obstruction of justice) and § 1510 (relating to obstruction of criminal investigations). *See* the RICO statute's definition of "racketeering activity" at § 1961(1).

18 U.S.C. § 1503 makes it a crime to commit certain specified acts, or to "corruptly . . . obstruct, or impede, the due administration of justice . . ." The extent to which conduct in civil litigation may be said to violate §1503, so as to support a RICO claim, is unclear. One district court has refused to apply § 1503 for RICO purposes "to a civil discovery dispute where there has been no court order or subpoena requiring the production of documents." Richmark Corp. v. Timber Falling Consultants, Inc., 730 F. Supp. 1525, 1532 (D. Or. 1990). The obstruction of justice alleged in Richmark consisted of a party's concealing and withholding from production in the civil action documents which should have been produced to the other party at a deposition. The district court reasoned that In light of the extensive framework of rules and remedies provided for the resolution of civil discovery disputes, the court declines to stretch the definition of obstruction of justice to include the concealment or withholding of discovery documents Ibid.

In Miller v. Glen & Helen Aircraft, Inc., 777 F.2d 496 (9th Cir. 1985), upon which Rafferty relies, the Ninth

Circuit held that § 1503 supported a RICO claim against a private investigator who allegedly conspired to interfere with the plaintiff's witnesses in an earlier federal lawsuit brought by plaintiff against an aircraft company for personal injury suffered in an airplane crash. In Miller the obstruction claim was asserted against an individual who was not a party to the earlier federal action, which so far as appears from the Ninth Circuit's opinion had been concluded.

In the case at bar, Rafferty v. NYNEX is still pending before Judge Greene and accordingly is subject to review by the Court of Appeals for the District of Columbia Circuit. Notwithstanding those realities, Rafferty seeks by a RICO action filed in this district to review and challenge the conduct of his adversaries in the action he chose to commence in the District Court for the District of Columbia. The practical consequence of Rafferty's claim would be to require this Court to sit in review not only of Judge Greene's supervision of Rafferty v. NYNEX but of the Court of Appeals as well.

I am aware of no case construing RICO to permit a litigant in a civil action pending in one district to allege in another district, a RICO claim against the parties in pending action or their privies, charges arising out of the conduct of the litigation in the other district. This is an improper use of the civil RICO statute, and for reasons that are apparent, I will not allow it. First, such a claim is barred by res judicata. Obstruction claims can and accordingly must be presented in the court in which the civil action giving rise to the alleged obstruction is pending. Second, a contrary conclusion would encourage forum shopping of a pernicious nature which itself would be the functional equivalent of obstruction of justice. That alternative ground justifies dismissal at this time of this claim of RICO injury, without waiting for

the entry of a final judgment in Rafferty v. NYNEX. *See* American Disposal Services, Inc. v. O'Brien, 839 F.2d 84, 88 (2d Cir. 1988); (affirming dismissal of second action in "a case involving a plaintiff who, having failed to obtain the desired relief in its home state forum of choice, brings a second proceeding in order to try again."); Telesco v. Telesco Fuel & Masons's Material, Inc., 765 F.2d 356, 362-63 (2d Cir. 1985).

I turn now to Rafferty's fifth and sixth claims, which do not invoke RICO. The fifth claim, alleged against all defendants for common law misrepresentation, will clearly be barred by res judicata when Judge Greene enters a final judgment in Rafferty v. NYNEX.

The sixth claim alleges, without giving any detail, that the "defendants" have made false and defamatory statements to the press and "potential employers of plaintiff." The complaint gives no details with respect to the source, **timing** or substance of any derogatory statements. Rafferty's brief at 31-35 (which cannot be accepted as a substitute for a sworn pleading) refers to press accounts and other documents appearing in February 1989 and during various dates in 1990. It is not clear from this chronology that this claim for defamation would be barred by res judicata when the Rafferty v. NYNEX judgment becomes final.

The result is that when the district court enters a final judgment in Rafferty v. NYNEX, most of the claims Rafferty asserts in the instant case will be barred by res judicata but two of them will not. In these circumstances, I make the following directions.

Proceedings in this Court, insofar as Rafferty seeks to recover for RICO injuries as a NYT ratepayer, a Telco competitor, and a Telco employee, and for common law misrepresentation, are stayed pending entry of final

judgment by the district court in Rafferty v. NYNEX, and in contemplation of dismissal at that time on the basis of res judicata.

I stay those proceedings in the exercise of my discretion. These claims cannot be dismissed on the basis of res judicata at this time because no final judgment has been entered in Rafferty v. NYNEX. But when that final judgment is entered, these particular claims will be dismissed; and it would be wasteful of the parties' energies and the resources of this Court to do anything other than to stay proceedings on these claims pending their apparently inevitable dismissal.

Insofar as Rafferty seeks to recover for RICO injury as a litigant in Rafferty v. NYNEX, the complaint is dismissed. Plaintiff is granted leave to file and serve an amended complaint, within thirty (30) days of the date of this Opinion and Order, asserting claims for RICO injury as a Myerson & Kuhn client and employee, and for common law defamation. In granting that limited leave to amend, I express no view on the legal viability of either claim. That is because claims must be asserted in sworn pleadings, and not simply in briefs, before defendants may be asked to respond to them or the Court be required to evaluate them. In addition, the claim for defamation against all defendants, lumped together, is pleaded in so vague and conclusory a fashion as to fail to satisfy even the lenient notice pleading requirements of Rule 8(a). Accordingly, if the claim is to be pressed it must be repleaded.

While the briefs address other questions, in the view I take of the case I need not reach them.

The foregoing is SO ORDERED.